FILED
JAN 29 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-571 / 91-781

431

JOHN W. McGREGOR,

Appellant,

vs.

GREENE COUNTY, IOWA,

Appellee.

Appeal from the Iowa District Court for Greene County, Timothy J. Finn, Judge.

Appellant challenges the trial court's award for the condemnation of two trees. **AFFIRMED.**

Wallace L. Taylor, Cedar Rapids, for appellant.

Vicki R. Copeland of Wilcox, Polking, Gerken, Schwarzkopf, Hoyt & Copeland, P.C., Jefferson, for appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ., but decided en banc.

HAYDEN, J.

John and Doris McGregor own land two and one-half miles west of Jefferson, Iowa, adjacent to the Raccoon River. A county road, commonly referred to as "Old Highway 30," runs through the property. Greene County is contemplating building a new bridge and straightening the road in that area. In the fall of 1989, the county surveyed McGregor's property for the proposed road. During the survey, the county cut down two oak trees.

The particular area from which the two trees were cut consists of 23.5 acres of timberland containing numerous trees and five acres of tillable land. Its assessed value remained at $2,103 from 1988 to 1991. The entire area containing 128 acres was assessed at $10,517 in 1989 and $11,429 in 1990.

McGregor filed an application for assessment of damages pursuant to Iowa Code section 314.9 to seek compensation for loss of the trees. A compensation commission awarded McGregor $500.

McGregor appealed the compensation commission award to the district court. Applying a method set forth in a publication by the International Society of Arboriculture, McGregor's expert opined the trees had values of $3,884 and $3,530, respectively. McGregor's expert did not have an opinion as to the difference in the value of the land before and after the trees were cut. An expert for the county believed the trees had a total value of $24 as

harvested lumber. The district court affirmed the compensation commission award of $500. McGregor appeals.

This case was tried at law. Our scope of review is for correction of errors at law. Iowa R. App. P. 4. The trial court's findings of fact have the effect of a special verdict and are binding on us if supported by substantial evidence. Id.; Iowa R. App. P. 14(f)(1).

McGregor first claims the trial court improperly relied on a magazine article which was not admitted into evidence. During cross-examination of McGregor's expert, Mr. Webster, the following exchange occurred without objection:

> Q. I would like to hand you what I have previously had marked as Defendant's Exhibit E . . . . I wonder if you could take a look at that article for me and tell me if you agree with its basic premise . . . or if you have any major disagreements or see any major discrepancies with your method of valuation? A. I see what they have highlighted here.
>
> Q. Those are my highlights. A. I understand. But I think they're quite pertinent. The method of evaluating shade and ornamental trees deals with individual trees and is not intended for evaluating trees in woodland and forest areas. I most definitely disagree with that.

The trial court in its ruling stated:

> On cross-examination, Mr. Webster stated . . . he strongly disagreed with an article which appeared in a learned journal (Exhibit E) which said: "The method of evaluating shade and ornamental trees deals with individual trees and is not intended for evaluating trees in woodland and forest areas."

A careful examination of the record reveals the trial court was not quoting from the exhibit which had not been

admitted into evidence. Rather, the trial court was merely referring to the part of Exhibit E read into the record by McGregor's expert.

To preserve error to the introduction of evidence, objections must be made at the earliest time after the grounds for objection become apparent. State v. Washington, 356 N.W.2d 192, 194 (Iowa 1984). Here, appellant's attorney made no objection to the use of Exhibit E for cross-examination purposes. Nor was a motion to strike made. This assignment of error has not been preserved for appeal.

McGregor additionally claims the trial court erred by applying the incorrect measure of damages for loss of trees. Specifically, McGregor asserts under the holding of Bangert v. Osceola County, 456 N.W.2d 183 (Iowa 1990), it was error for the trial court to rely on the assessed value of their property in determining the amount of damages. We disagree.

In Bangert our supreme court stated:

> [I]t 'is impossible to state a simple, all-purpose measure of recovery for loss of trees. Because of the wide variety in their use the law has devised a number of alternative measures, to be applied according to the location and use of the . . . trees.' We indicated the loss may be measured by the difference in the value of the realty before and after the destruction of the trees, the commercial value of the trees or the replacement cost. We did not consider trees with special aesthetic value.

Id. at 189 (citing Laube v. Estate of Vernon, 376 N.W.2d 108, 109 (Iowa 1985)).

When trees have a special use, the difference in the value of the realty before and after the destruction of the trees may not be an appropriate measure of damages. Bangert, 456 N.W.2d at 190. Likewise, commercial market value may be an inappropriate measure of damages for loss of special use trees. Id. If an intrinsic loss has occurred, the court may use either replacement cost of trees, or allow additional damages caused by the deprivation of the trees' special value, or a combination of both. Id.

In the present case, no direct evidence was presented on the issue of replacement value. Therefore, the trial court faced a difficult task of determining the additional damages caused by the deprivation of the trees' special value. To make this determination, the trial court considered a number of factors. McGregor's testimony concerning the trees' special use as a "natural succession of nature" was considered by the court. The testimony of McGregor's expert describing the area as a "rare sample of something being saved" was also considered by the court. The species, condition, size, and location of the trees were taken into consideration. The court reviewed the extremely divergent values placed on the trees by two expert witnesses. Finally, the court considered the difference in value of the property before and after the the trees were removed. We conclude the assessed value of the property was a relevant and proper factor for the court

to consider in determining the additional damages caused by the deprivation of the trees' special value.

After evaluating all of these factors, the trial court determined the $500 awarded by the compensation commission was a proper measure of damages. We agree and accordingly affirm.

Costs of appeal are taxed to appellant.

AFFIRMED.

All judges concur except Habhab, J., who specially concurs.

HABHAB, J. (specially concurring)

I concur in the result only. I disagree with any suggestion in the majority opinion that assessed value may be considered as evidence when determining the value of real property for other purposes. Assessment roles are not relevant to the value of property. Morrison v. Culver's Estate, 216 Iowa 676, 682, 248 N.W. 237, 240 (1933); see also 29 Am Jur 2d Evidence § 401; 31A C.J.S. Evidence § 182(4). Although I disagree in this respect I concur with the majority, for I find the trial judge did not give weight to the assessement when determining damages.